

EMPLOYER STATUS DETERMINATION

New Jersey Transit Corporation

New Jersey Transit Rail Operations Corporation

New Jersey Transit Management Information System Department

This is the decision of the Railroad Retirement Board regarding the status of New Jersey Transit (NJ Transit) and New Jersey Transit Management Information System Department (NJT MIS) as employers under the Railroad Retirement and Railroad Unemployment Insurance Acts (the RRA and RUIA), and regarding the continuing status of New Jersey Transit Rail Operations (NJT Rail), and the status of the employees of these entities, under the Acts. NJT Rail has been found to be a covered employer. NJ Transit itself has previously been determined not to be an employer covered by the Acts (see Legal Opinion L-83-59). The status of NJT MIS as an independent entity - not part of NJ Transit - has not previously been considered by the Board.

The evidence shows that NJ Transit is an instrumentality of the State of New Jersey, charged pursuant to the New Jersey Public Transportation Act (New Jersey Statutes Annotated § 27-25-1 et seq.) with the operation and improvement of a coherent, efficient and effective transportation system for New Jersey. NJ Transit manages funding and designs, maintains, and sets fares for public bus and rail transportation in New Jersey.

NJ Transit conducts actual public transportation operations through two subsidiary public corporations. The first subsidiary corporation, New Jersey Transit Bus Operations (NJT Bus), was formed in 1980 to assume passenger service formerly provided by several private motor bus operators. NJT Bus currently operates approximately 2,000 buses in 20 of the 21 counties in New Jersey, with approximately 4,400 employees. In 1983, NJT Bus was determined not to be a covered employer (Legal Opinion L-83-59.)

New Jersey Transit Rail Operations was created as a subsidiary of NJ Transit to operate commuter rail service which was transferred from Conrail on January 1, 1983, pursuant to section 1136 of the Northeast Rail Service Act of 1981 (95 Stat. 647). NJT Rail currently operates 11 commuter lines over 400 miles of track, with approximately 3,300 employees. NJT Rail was determined to be a covered employer as of July 6, 1982, the date it first hired employees preparatory to assuming its rail commuter obligations (Legal Opinion L-83-59).

In 1990, the Office of Inspector General of the Railroad Retirement Board (OIG) conducted an audit of NJ Transit and NJT Rail to determine the accuracy of compensation and service reports filed for 1988. In Audit Report 91-07, issued January 30, 1991, the OIG found generally that NJ Transit and NJT Rail properly administered responsibilities imposed by the RRA and RUIA. However, the OIG identified two instances where NJ Transit did not report to the Board individuals whom the OIG believed could be considered covered employees under the Acts. The OIG referred this matter to the Board's Director of Research and Employment Accounts with a suggestion that a status determination be made.

Initially, the OIG found that the NJT Management Information System Department (MIS) within NJ Transit, which performs the combined electronic data processing functions for NJ Transit, NJT Rail and NJT Bus, performed significant services for NJT Rail. Moreover, certain MIS employees who spent the majority of their time on NJT Rail matters were listed in the internal NJT Rail telephone directory in the same manner as employees of NJT Rail. Additional information supplied subsequent to issuance of OIG Audit 91-07 establishes that MIS was constituted in 1982 within NJ Transit as a result of information problems encountered with acquisition of the bus lines in 1980. No employees were transferred later from Conrail as part of the assumption by NJT Rail of Conrail commuter service pursuant to the Northeast Rail Service Act. Most of the approximately 95 employees of MIS work in the NJ Transit headquarters building at One Penn Plaza in Newark. Within the organizational structure of MIS, however, a group of 23 employees and one contractor comprise an MIS "Rail Unit" located in the NJT Rail office at 1160 Raymond Boulevard in Newark. While only 10 percent of staff time of the entire MIS is devoted to work for NJT Rail, an average of 60 percent of the staff time of MIS Rail Unit is devoted to work for NJT Rail, and nine employees devote 100 percent of their time to rail work. NJ Transit explains that the MIS Rail Unit is located at the NJT Rail Office, and listed in the NJT Rail Directory, "so as to provide them easier access to NJ Transit Rail users and vice versa."

In addition to employees in the MIS Rail Unit, the OIG noted that several individuals had been transferred from NJ Transit to positions in NJT Rail, but had been retained on the NJ Transit payroll system to continue these individuals' participation in the New Jersey public employee pension system. NJ Transit has provided information regarding the following individuals or summarized below:

<u>Name</u>	<u>Title</u>	<u>Dates</u>	
		<u>Start</u>	<u>End</u>
George D. Warrington	VP/GM Rail operations	12-01-88	04-25-90
Victor T. Strom	DGM-Engineering, Facilities & Security	03-01-89	01-10-91
George U. Richmond	DGM-Development & Construction	02-29-88	06-01-90
Stephen Jurow	Director, Performance & Program Analysis	12-29-88	11-20-89
Joel Golub	Asst. Director - MIS - Rail	06-02-86	01-01-87
	Subsidiary Director MIS	01-01-87	10-29-90
Mark Dolaghan	Special Assignment-Rail	03-20-89	07-20-89

<u>Name</u>	<u>Title</u>	<u>Start</u>	<u>End</u>
Susan Kirk	Special Assignment-Rail	03-00-89	03-00-90
Carla Matviak	Special Assignment-Rail	03-20-89	07-20-89
Joy McGovern-Hraber	Special Assignment-Rail	03-20-89	07-20-89
Kate Downey	Mgr., Marketing Programs	12-01-86	02-04-91
George Fontaine	Supvr., Customer Service Penn Station	08-06-84	Present
Adrienne Lewis-Thompson	Marketing Coordinator	02-09-87	04-03-90
Lee J. Heumiller	Asst. Controller- Special Projects	05-01-87	07-01-91

Section 1(a)(1) of the Railroad Retirement Act (RRA) (45 U.S.C. § 231(a)(1)), insofar as relevant here, defines a covered employer as:

(i) any express company, sleeping-car company, and carrier by railroad, subject to chapter 105 of Title 49;

(ii) any company which is directly or indirectly owned or controlled by, or under common control with one or more employers as defined in paragraph (i) of this subdivision and which operates any equipment or facility or performs any service (other than trucking service, casual service, and the casual operation of equipment and facilities) in connection with the transportation of passengers or property by railroad * * *.

A recent decision of the United States Court of Appeals for the Federal Circuit regarding a claim for refund of taxes under the RRTA held that a parent corporation which owns a rail carrier subsidiary is not under common control with the subsidiary within the meaning of §3231. Union Pacific Corporation v. United States, 5 F. 3d 523, (Fed. Cir., 1993). The facts in the Union Pacific case are analogous to those presented by NJ Transit. Accordingly, the Board finds that New Jersey Transit, including the MIS division, is not and has never been an employer covered by the RRA and the RUIA because it is not under common control with its rail carrier subsidiary.

However, this conclusion leaves open the question of whether the MIS Rail Unit and certain other individuals on the payroll NJ Transit should be considered employees of NJ Rail for purposes of receiving credit under the Acts administered by the Board. In this regard, section 1(b) of the Railroad Retirement Act and section 1(d)(1) of the Railroad Unemployment Insurance Act both define a covered employee as an individual in the service of an employer for compensation. Section 1(d) of the Railroad Retirement Act further defines an individual as "in the service of an employer" when:

(i)(A) he is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service, or (B) he is rendering professional or technical services and is integrated into the staff of the employer, or (C) he is rendering, on the property used in the employer's operations, personal services the rendition of which is integrated into the employer's operations; and

(ii) he renders such service for compensation * * *.

Section 1(e) of the Railroad Unemployment Insurance Act contains a definition of service substantially identical to the above, as do sections 3231(b) and 3231(d) of the Railroad Retirement Tax Act (26 U.S.C. §§ 3231(b) and (d)).

Finally, section 1(k) of the RRA explicitly defines the term employee to include an officer of an employer. Sections 1(a), 1(b) and 1(d) of the (RUIA) (45 U.S.C. §§ 351(a), (b) and (d)) contain substantially similar definitions, as does section 3231 of the Railroad Retirement Tax Act (RRTA), (26 U.S.C. § 3231).

The evidence is that the MIS "Rail Unit" is located in the NJT Rail office. An average of 60 percent of the staff time of MIS Rail Unit is devoted to work for NJT Rail, and nine employees devote 100 percent of their time to rail work. The MIS Rail Unit employees are listed in the NJT Rail directory, "so as to provide them easier access to NJ Transit Rail users and vice versa." In the opinion of a majority of the Board, these facts indicate that while nominally on the payroll of NJ Transit, the MIS Rail Unit employees meet the definition of employee as specified in paragraph (B) by performing professional services on NJT Rail premises which were integrated into Rail's operations. Consequently, a majority of the Board finds that the individuals working in the MIS Rail Unit perform service to NJT Rail, a covered employer which is creditable under the Acts.

Finally, as noted above, the OIG identified several individuals who maintained positions with NJT Rail but remained on the payroll of NJ Transit. These individuals may be categorized with few exceptions as filling executive or managerial positions, including the Vice President and General Manager of NJT Rail. Corporate officers are employees under section 1(k) of the RRA.

The Vice President and General Manager, and the three Directors of Engineering, Development, and Performance are corporate officers of NJT Rail. Accordingly, the Board finds that these four individuals are employees of NJT Rail, and finds that their service and compensation should be reported as creditable under the RRA and RUIA.

The remaining listed individuals cannot be considered corporate officers. Hence, their service may be found to be creditable employee service only if they meet the general definition of employee under the Acts under section 1(d)(1) of the RRA. It is the opinion of the Board that the manager of marketing programs, supervisor of customer services, assistant controller, special projects, and marketing coordinator are employees since they are or were rendering professional or technical services to NJ Rail and are or were by the nature of their services clearly integrated into the staff and operations of NJT Rail. The Assistant Director, MIS-Rail, is included in the group of employees in MSI-Rail unit who would be covered as discussed above.

With respect to the remaining listed employees, the evidence shows that they were with NJ Rail for a very short period of time on special assignment from NJ Transit and the Board finds the evidence insufficient to support a conclusion that they were employees of NJT Rail.¹ It is therefore the determination of the Board that service performed by these employees for NJT Rail is not covered employee service under the Railroad Retirement and Railroad Unemployment Insurance Acts, which must be reported to the Board.

Glen L. Bower

V. M. Speakman, Jr.

Jerome F. Kever (Dissenting Opinion
Attached)

Attachment
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¹The Board notes that none of the affected individuals has filed a request for an amendment with respect to the amount of service or compensation to be credited pursuant to section 260.2 of the Board's regulations (20 CFR 260.2).

DO NOT PRINT

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employees preparatory to assuming its rail commuter obligations (Legal Opinion L-83-59).

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Section 1(a)(1) of the Railroad Retirement Act (RRA) (45 U.S.C. § 231(a)(1)), insofar as relevant here, defines a covered employer as:

(i) any express company, sleeping-car company, and carrier by railroad, subject to part I of the Interstate Commerce Act;

(ii) any company which is directly or indirectly owned or controlled by, or under common control with one or more employers as defined in paragraph (i) of this subdivision and which operates any equipment or facility or performs any service (other than trucking service, casual service, and the casual operation of equipment and facilities) in connection with the transportation of passengers or property by railroad *

* * .

Section 1(b) of the RRA defines a covered employee as an individual in the service of a covered employer for compensation. In addition, section 1(k) of the RRA explicitly defines the term employee to include an officer of an employer. Sections 1(a), 1(b) and 1(d) of the (RUIA) (45 U.S.C. §§ 351(a), (b) and (d)) contain substantially similar definitions, as does section 3231 of the Railroad Retirement Tax Act (RRTA), (26 U.S.C. § 3231).

In addition, regulations of the Board at 20 CFR 202.9(a) provide that

With respect to any company * * * under common control* * * [with a rail carrier and which is] performing a service or operating equipment in connection with the transportation of passengers or property by railroad, * * * but which is principally engaged in some other business, the Board will * * * [consider] whether it is an employer or whether some identifiable and separate enterprise conducted by the * * * company is to be considered to be the employer * * *.

NJT Rail has previously been determined to provide rail carrier passenger service both within the meaning of the Acts, and as defined by section 511 of the Rail Passenger Service Act (45

U.S.C. § 591).² NJ Transit is under common control with its rail carrier subsidiary NJT Rail. Thus the Board does not need to reexamine its past determination that in light of the recent contrary holding of the United States Claims Court. See Union Pacific Corporation v. United States, 26 Cl. Ct. 739, appeal docketed. However, NJ Transit whether or not "under common control" with its subsidiary is not a covered employer because it does not perform services in connection with rail transportation within the meaning of the Acts.³ The new information obtained as a consequence of the OIG audit does not indicate that the primary purpose of NJ Transit has altered. Accordingly, the Board finds that NJ Transit has not at any time been an employer under the Acts.

However, the information now available indicates that NJ Transit formed the MIS Rail Unit as a separate and distinct division within its organization. Members of the "Rail Unit" they are listed in the NJT Rail telephone directory with individuals who NJT Rail admits are rail employees. These individuals are located in the NJT Rail headquarters building apart from other MIS employees. The activities of this group of employees were controlled by the parent agency in the same fashion as the activities of the operating divisions, NJT Rail and NJT Bus. In this sense, MIS is akin to a subsidiary of a corporation in the private sector. The Board therefore finds MIS to be under common control with NJT Rail.

The evidence indicates that 60 percent of staff time of MIS is spent exclusively performing electronic data processing for NJT Rail. The Internal Revenue Service has held in a similar case that a unit which performed electronic data processing activities for its affiliate railroad was engaged in a service in connection with railroad transportation. See Rev. Rul. 77-445, 1977-2 Cum.Bull. 357. In that ruling the IRS applied the principles of segregation within a larger company to determine that only the employees engaged in service for the railroad were subject to the RRTA. Accordingly, the Board finds that evidence supports a

²Section 511 provides that

Any commuter authority operating commuter service under this subchapter shall be subject to applicable laws with respect to such service, including, but not limited to, the Railway Labor Act (45 U.S.C. § 151 et seq.), the Railroad Retirement Act of 1974 (45 U.S.C. 231 et seq.), the Railroad Retirement Tax Act (26 U.S.C. 3201 et seq.), and the Railroad Unemployment Insurance Act (45 U.S.C. § 351 et seq.).

³No. 93-5035 (Fed. Cir., November 19, 1992). Oral argument was held in August of 1993.

determination that the Rail Unit of the New Jersey Transit Management Information System Department has been a segregable unit employer performing a service in connection with railroad transportation under the Acts since January 1, 1983, the date service by New Jersey Transit Rail Operations commenced rail carrier passenger service. 20 CFR 202.9.

Finally, as noted above, the OIG questioned the status of several individuals who allegedly performed various duties for NJT Rail while remaining on the payroll of NJ Transit. However, the Board finds the evidence insufficient to support a determination that these individuals meet any definition of employee under the Acts. Accordingly, the Board finds that none of the individuals identified by the OIG were at any time employees of NJT Rail for purposes of benefit entitlement under the Acts.

Glen L. Bower

V. M. Speakman, Jr.

Jerome F. Kever

NJT1407.COV
CCCook:SABartholow:TWSadler:KTBlank:scm

ATTACHMENT

<u>Name</u>	<u>Title</u>	<u>Dates</u>	
		<u>Start</u>	<u>End</u>
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Joy McGovern-Hraber	Special Assignment-Rail	03-20-89	07-20-89
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George Fontaine	Supvr., Customer Svce Penn Station	08-06-84	Present
Adrienne Lewis-Thompson	Marketing Coordinator	02-09-87	04-03-90
Lee J. Heumiller	Asst. Controller- Special Projects	05-01-87	07-01-91

summarized below:

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Joel Golub	Asst. Director -	06-02-86	01-01-87

MIS - Rail

Subsidiary Director MIS 01-01-87 10-29-90

Mark Dolaghan

Special Assignment-Rail 03-20-89 07-20-89